



Appeal Decision

Inquiry Held on 11 July 2017

Site visit made on the same day

by Mrs H M Higenbottam BA (Hons) MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 01 August 2017

Appeal Ref: APP/V2255/C/16/3155962

Land on south side of Hall House, Tunstall, Sittingbourne, Kent ME9 8DX

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
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- The enforcement notice was issued on 8 July 2016.
- The breach of planning control as alleged in the notice is 'Without planning permission, the material change of use of the Land from agricultural land to land used as part of the residential garden to Tunstall Hall House, in addition to the creation of an ornamental pond and the erection of sheds, the extent of which would in the opinion of the Council, require the benefit of planning permission which as has not been granted.'
- The requirements of the notice are:
 - (i) Cease the use of any part of the Land as a domestic garden associated with Tunstall Hall House;
 - (iii) Remove any structures from the Land that are not associated only with agricultural use of the Land;
 - (iv) Remove the ornamental pond and its surrounding paving and restore the land to its previous levels and condition.
- The period for compliance with the requirements is three months.
- The appeal is proceeding on the grounds set out in section 174(2) (d), (f) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decision: The appeal is dismissed and the enforcement notice is upheld with corrections and variations.

Preliminary Matters

1. All oral evidence at the Inquiry was given under oath or affirmation.
2. The appeal on ground (g) was withdrawn at the Inquiry. The appeal continues on grounds (d) and (f) only.
3. The Council acknowledge that 1-6 School View were built in 1966 and that parts of the foul drainage, effluent systems and the septic tanks to serve those dwellings are on the appeal site. The Council confirmed that there was no intention that any of the septic tanks or any drain serving those properties would be the subject of the Notice.
4. The Council confirmed that the purpose of the Notice is to remedy the breach of planning control (section 173(4) (a) of the Act).

The Notice

5. The land registry documents name the dwelling that was once Tunstall Memorial Hall as Hall House. I will therefore correct the references to the dwelling so that it refers to Hall House in paragraph 2 and 3 of the Notice. This will cause no injustice or prejudice to either party.
6. A notice directed at a material change of use may require the removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development or be permitted development or be immune from enforcement so that the land is restored to its condition before the change of use took place. (*Murfitt v SSE [1980] JPL 598, Somak Travel v SSE [1987] JPL 630*). However, where those works had been undertaken for a different and lawful use and could be used for that other lawful use even if the unauthorised use ceased, those works would not have facilitated the material change of use (*Bowring v SSCLG & Waltham Forest BC [2013 EWHC 1115 (Admin)]*).
7. Both parties accepted that the sheds referred to in the allegation were erected prior to the alleged material change of use and over four years ago. The sheds therefore did not facilitate the material change of use and, having been erected for over four years, as accepted by the Council, they are immune from enforcement action.
8. In the light of this I will correct the allegation to 'Without planning permission, the material change of use of the land from agriculture to residential use as a garden to Hall House and the creation of an ornamental pond with paving to facilitate that use.' I will also vary the requirements to follow on from this corrected allegation. Neither party objected at the Inquiry to this corrected allegation or the proposed variations to the requirements.

Appeal on ground (d)

9. In appealing on ground (d), the burden of proof is firmly on the appellant to demonstrate on the balance of probabilities that the development was lawful through the passage of time at the date when the enforcement notice was issued. For that to succeed the use of the land for residential use as a garden must have continued throughout a ten year period to the extent that enforcement action could be taken against it at any time during that period. The material date in this case is 8 July 2006 i.e. ten years before the enforcement notice was issued.
10. The appellant purchased Tunstall Memorial Hall, now known as Hall House, in July 2001. He then proceeded to convert the building into a dwelling, moving into it with his family at the end of 2001/beginning of 2002. He stated that he took the fences down between the end of the land historically associated with the Tunstall Memorial Hall and the appeal site and grass seeded the area in autumn 2002. He then mowed the grass two to four times a year. In around May 2008 he started mowing the grass once a week in the growing season.
11. Mrs Panton, previously owned the land the subject of the Notice, and it was a corner of the agricultural field she still owns to the south of the appeal site. Over the years this piece of agricultural land, that is the appeal site, became less and less viable to farm. When it was decided to sell the Tunstall Memorial

- Hall to be converted to a dwelling, in order to fund the new village hall, Mrs Panton offered the land to enhance the sale of that building. While the appellant had use of the appeal site from 2001, he did not own it until 2007. The evidence of the appellant, Mrs Panton and Mr Burgess is that the land has been used as residential garden since he first had use of the appeal site land.
12. A planning application was refused in August 2002 for the change of use of the appeal site to residential curtilage. This was dismissed at appeal¹ in February 2003. The Appeal Decision records that the boundary of the village is formed by the hedges of the properties fronting the road, including the appeal site. I take that to mean that a hedge existed between the site the subject of the current appeal, and the original land that went with the Tunstall Memorial Hall at that time. There is no dispute that the site visit for the appeal was made on 31 January 2003 as recorded on the Appeal Decision.
 13. In May 2007 planning permission was granted for a garage at Hall House. As part of the application process the Planning Officer visited the site and took photographs on 12 February 2007. Those photographs roughly show half of the appeal site was muddy and the appellant states that shrubs, trees and hedging were taken out and it was reseeded after that. I therefore find that at this time, at least part of the appeal site would not have been capable of use as a garden.
 14. In oral evidence the appellant stated he built the ornamental pond on the land in October 2013. Mr Bushell, a local resident, gave evidence that he retired at Christmas 2012 and that the ornamental pond was built in the following year, i.e. 2013. However, written evidence stated it was built in 2011. An aerial photograph dated 7/9/2013 (which is 9 July 2013) shows no pond on the land. An aerial photograph dated 4/20/2015 (which is 20 April 2015) shows the ornamental pond in situ. The appellant's evidence of when this ornamental pond was constructed is inconsistent. I therefore find, on the balance of probabilities, that the ornamental pond was created sometime between the dates of these two photographs in 2013 and 2015.
 15. The Council issued a Planning Contravention Notice (PCN) dated 19 February 2016. In answer to that PCN the appellant's agent confirmed that the use of the land is ancillary to Mr Bartholomew's role as a Tenant/Manager of Grove End Farm and that the land has not been used for any other purpose except '*on rare occasions when his role as a local resident involved in the Parish's community*', which I take to mean when the land was used for community purposes although no examples of such use was provided. At that time the appellant's agent confirmed that the ornamental pond was created in 2011, contrary to the aerial photographic evidence now before me. He also confirmed that the buildings located on the land were being used to store materials ancillary to the operation of Grove End Farm comprising quad bikes, farm tools, feed and hay. The appellant accepted at the Inquiry that he authorised his agent to provide these answers in the form they were to the Council.
 16. A number of complaints had been made to the Council over the years about the use of the appeal site. The Council's Enforcement Team Manager had visited the appeal site on a number of occasions, not always speaking with the appellant. On 22 December 2010 he visited the site. It was an unannounced

¹ APP/V2255/A/02/1102864

- visit. He spoke with Mr Bartholomew while at the site and his site notes record that Mr Bartholomew had placed a chicken shed next to his shed and that Mr Bartholomew stated that the field had been in his possession for over ten years and he asked whether he could claim it as his garden. It is recorded in the note that the land was not being used as a garden.
17. The Enforcement Team Manager, along with a colleague, carried out another site visit on 1 February 2011. The note of that visit states two sheds contain straw and chicken feed and that it was not being used as a garden and that the land is agricultural. These matters are recorded as having been discussed with Mr Bartholomew. The officers advised him that it was unlikely that planning permission for a material change of use would be granted given the previous appeal decision.
 18. In oral evidence to the Inquiry the Enforcement Team Manager recalled that the appellant, Mr Bartholomew, had consistently stated that the appeal site was not part of his garden. At the February 2011 site visit he specifically alleged use for residential purposes and Mr Bartholomew advised he kept chickens and the use was agricultural. The Enforcement Team Manager had viewed the land on a number of occasions from the footpath and it was rough grass, not cut short, did not give the appearance of being used as part of the garden and there was no domestic paraphernalia on it during 2010/2011. The Enforcement Team Manager stated he had discussed whether there had been a material change of use to garden earlier with colleagues but that on balance it was felt that there had not been. However, by 2016, just before serving the PCN, there were clear indicators that there had been a material change of use of the land to residential garden.
 19. A range of aerial photographs have been provided. The Council's aerial photographs in 1999, 2002 and 2008 show a boundary between the garden of Hall House and the appeal site. In 1999 crops extend almost to the boundary with Hall House. In 2002 there is a substantial vegetative boarder between the appeal site and Hall House. The appeal site and the agricultural field appear distinct. The land on the appeal site is rough grass. In 2008 there is an altered boundary between the appeal site and Hall House, and there is a clear line shown across the photograph, although much of the boundary vegetation has been removed. In 2012 the boundary between the two areas seems to have been removed, although there is a difference in the quality of the grass, being rougher, on the appeal site land than that of the Hall House grounds.
 20. The appellant's aerial photographs are from 2003, 2008, 2013 and 2015. In 2013 (date 7/9/2013) there is a vehicle on the appeal site, the shed structure/s are apparent and the land including around the septic tanks, has been mown. There is no pond in the 2013 photograph. In 2015 (dated 4/20/15 i.e. 30 April 2015), the pond is in situ, the structure/s and a number of vehicles are on the land, no fence is apparent between the appeal site and the Hall House land.
 21. The evidence is at times contradictory from the appellant and his witnesses. However, it is clear that the people who gave evidence in support of the appellant understood it had always been the intention of the appellant to utilise the land the subject of the Notice as a residential garden. In fact, Mrs Panton specifically made the land available to the appellant to purchase for that purpose. The evidence suggests it was always the intention of the appellant to pursue a residential use of the appeal site as garden to the dwelling he had

created in the Tunstall Memorial Hall. This is despite planning permission being refused and then an appeal being dismissed in 2003 for that proposed use. However, the way in which the land was used evolved and was not a residential garden for many years after the occupation of the Tunstall Memorial Hall as a dwelling.

22. I also note that the occupiers of 1, 4, 5 and 6 School View support the use of the land as residential and consider such a use gives security for their properties' foul drainage.
23. To my mind, the creation of the ornamental pond, sometime between 2013 and 2015, was a tipping point as to how the land was used. In my view, the creation of the pond clearly facilitated a material change in use of the land to residential garden. Around the time the ornamental pond was created the land was more managed and became a manicured area, with more clearly defined residential use indications such as frequent mowing of the grass in the growing season, the creation of the pond and the demarcation between the appeal site and the other land being removed. These can be seen on the aerial photographs as the colour of the grass changes and the land appears more incorporated into the land historically associated with the original land at Hall House. I therefore find, as a matter of fact and degree, that a material change of use of the land the subject of the Notice has taken place and that this is a breach of planning control. That breach, on the balance of probabilities, has not been taking place for 10 years prior to the issue of the Notice and the appeal on ground (d) fails.

Appeal on ground (f)

24. This ground of appeal is that the requirements of the notice are excessive and that lesser steps would overcome the objections. In appealing on ground (f) the appellant must specify specific lesser steps which, in their view, would overcome the objections to the appeal development.
25. The appellant put forward two alternative lesser steps. Either only cease the use of the land as residential, thus retaining the ornamental pond as it is, or to cease the use of the land as residential and remove the paving around the ornamental pond. In both cases the pond would remain on the site to, in the appellant's view, provide improved the natural habitat for the flora and fauna of the area.
26. The pond with the paving around it is an attractive man made residential pond appropriate for a residential garden. However, it is not a natural or semi-natural feature designed specifically for indigenous wildlife. I therefore on the basis of what is before me, do not consider that the retention of the pond to provide a water based habitat is appropriate in this setting, adjacent to an arable field.
27. The power to allow an appeal under ground (f) in s174(2) of the Act is not a power to grant planning permission. I have found that the creation of the ornamental pond facilitated the material change of use. The purpose of the Notice is to remedy the breach of planning control. It thus follows that the removal of the ornamental pond from the land is necessary to remedy the breach of planning control and is not excessive.

28. I therefore find that the requirements of the Notice, as varied, would not exceed what is necessary to remedy the breach of planning control. The appeal under ground (f) fails.

Conclusion

29. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and variations.

Formal Decision

30. It is directed that the enforcement notice be corrected by:

- The deletion of the word 'Tunstall' after 'known as' and before 'Hall House' in paragraph 2; and
- The deletion, at paragraph 3, of the words 'agricultural land used as part of the residential garden to Tunstall Hall House, in addition to the creation of an ornamental pond and the erection of sheds, the extent of which would in the opinion of the Council, require the benefit of planning permission which has not been granted' and the substitution thereto of the words 'agriculture to residential use as a garden to Hall House and the creation of an ornamental pond with paving to facilitate that use'.

And varied by:

- Delete the words 'of any part of the Land as a domestic garden associated with Tunstall Hall House' in paragraph 5 (i);
- Delete paragraphs 5 (iii) and (iv); and
- Insert the following after paragraph 5 (i) '(ii) Remove the ornamental pond and paving from the land and restore the land to its condition before the breach took place.'

Subject to these corrections and variations the appeal is dismissed and the enforcement notice is upheld.

Hilda Higenbottam
Inspector

APPEARANCES

FOR THE APPELLANT:

Mr Burke	Agent for the appellant
He called	
Mr P Bartholomew	Appellant
Mrs P Panton BEM	Owner of Grove End Farm, previous owner of the appeal site
Mr T Ormesher	National Farms Union
Mr L Burgess	Local resident

FOR THE LOCAL PLANNING AUTHORITY:

Ms Lawson	Of Counsel, instructed by Swale Borough Council
She called	
Mrs Murton	Senior Planning Officer, Swale Borough Council
MRTPI BA (Hons)	

INTERESTED PERSONS:

Mr Bushell	Local resident
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DOCUMENTS SUBMITTED AT THE INQUIRY

- 1 Proof of evidence and witness summary bundle submitted by the appellant.
- 2 Signed statement of common ground submitted by the appellant.
- 3 Signed note withdrawing ground (g) submitted by the appellant.